91-1510

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

MICHAEL J. SULLIVAN,

Petitioner,

v.

CHESAPEAKE AND OHIO RAILWAY COMPANY,
a corporation,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I.

Under Section 455 of the Judicial Code does a United States District Court Judge have a responsibility to directly and fully disclose facts underlying her spouse's attorney-client relationship with a party to the litigation?

II.

Under Section 455 of the Judicial Code does a party litigant's payments of attorney's fees to the spouse of a United States District Court Judge constitute a "financial interest" mandating disqualification of the United States District Court Judge from cases involving that party litigant?

III.

Under Section 455 of the Judicial Code is the spouse of a United States District Court Judge who is currently providing legal representation to a party litigant in other major litigation considered to be an "adviser" to or "active participant in the affairs of" that party litigant thereby requiring disqualification of that United States District Court Judge?

IV.

Under Section 455 of the Judicial Code is an Appellate Court's finding that a party has failed to hold an evidentiary hearing, a hearing not even contemplated by the judicial code, actually a finding of waiver of the provisions of Section 455, a waiver which is expressly prohibited by the language of Congress in Section 455?

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OPINIONS BELOW

The opinion and judgment of the United States Court of Appeals for the Sixth Circuit is reprinted as Appendix A. This 19 page opinion was ordered not published pursuant to Sixth Circuit Rule 24. It affirms a judgment of the United States District Court for the Eastern District of Michigan. The trial court's post trial order denying Petitioner's Motion to Vacate the Judgment is reprinted as Appendix C.

JURISDICTION

The Judgment of the United States Court of Appeals for the Sixth Circuit was entered on October 25, 1991. Petitioner timely filed a Petition for Rehearing and Suggestion for Rehearing En Banc. The court below entered an order denying the petition on December 19, 1991. This petition is filed within ninety (90) days of that date. The jurisdiction of this Court to review the judgment on petition for certiorari rests upon Section 1254(1) of the Judicial Code [28 U.S.C. Sect. 1254(1)].

STATUTES INVOLVED

The relevant statute involved is Section 455 of the Judicial Code (28 U.S.C.) as follows:

Sect. 455 Disqualification of justice, judge or magistrate

(b) He shall also disqualify himself in the following circumstances:

(4) He knows that he . . . or his spouse . . . has a financial interest in the subject matter in controversy or in a party to the proceeding or any other interest that could be substantially affected by the outcome of the proceeding;

(d)(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as a director, adviser, or other active participant in the affairs of a party.

(e) No justice, judge or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the

ground for disqualification arises only under subsection (a) waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

STATEMENT OF THE CASE

SUMMARY OF FACTS:

Petitioner brought a claim for compensation pursuant to the Federal Employers Liability Act (FELA), 45 U.S.C. Sect. 51-60, for injuries sustained at work on May 13, 1987.[1]

Petitioner injured his right knee as a result of a defective coupler operating mechanism on a railcar. When the mechanism failed to operate properly the Petitioner was required to manually attempt to adjust the coupling mechanism. While performing this function, the knuckle component of the coupler fell out and Petitioner jumped back to avoid it. In doing so, he fell over the rail and injured his knee.

At trial, Petitioner presented evidence from treating physicians that Petitioner had sustained a serious and disabling injury. Defendant countered this with an examining physician it chose and a hired expert, Dr. Wolf. Petitioner's retained expert, Dr. Eisenman was barred by the trial court.

On July 29, 1989, the jury found for the Petitioner in the amount of $40,000.00. Judgment was entered on the

[1] Jurisdiction was invoked under the provisions of Title 45 U.S. Code Sec. 56 and Title 28 U.S. Code Sec. 1331.

verdict on July 31, 1989. Post trial motions were filed and denied by written orders dated December 28, 1989. The post trial motions requested that the judgment be vacated, or a new trial on the issue of damages, or in the alternative a new trial on all issues.

The issues raised include several discretionary rulings of the trial court (for instance, barring an important medical witness for Petitioner, mentioning collateral source benefits before the jury, and an improper damage instruction) which Petitioner claimed had a significant impact on the jury's low damage award.

HISTORY OF THE DISQUALIFICATION ISSUE:

At the time of the Final Pretrial Hearing on November 15, 1988, defendant's counsel told Petitioner's counsel outside the presence of the trial judge, that Judge Hackett's husband had occasionally represented the CSX in FELA cases. The relationship was never disclosed by the trial judge, nor ever discussed in the trial judge's presence.

On the second day of trial in July 1989, the trial Court's clerk approached trial counsel during a recess and presented them with a handwritten stipulation on yellow legal pad which stated "Petitioner is aware that Judge Hackett's husband is an attorney who represents CSX Transportation and he waives any objections to her presiding over this case." and asked the Petitioner's counsel to initial it.

Petitioner's counsel initialed it and thereafter it became part of the Final Pretrial Order.

Petitioner filed a post trial motion to Vacate the Judgment arguing that the trial court had a mandatory obligation pursuant to 455(b) to recuse herself and that such

an obligation could not be waived by a party at any time. Petitioner relied upon the spouse's employment as an attorney for CSX and the definition of financial interest in 455(d)(4) as follows:

> " 'financial interest' means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party . . ."

The Respondent's response to this motion noted that the trial court's spouse, "does very little Federal Employees (sic) Liability Act . . . litigation work of any kind for Defendant" and "Judge Hackett's husband represents Defendant, but in matters totally unrelated to this case. Further, his law firm, Frasco, Hackett & Mills, upon information and belief, has a substantial number of clients and receives only a small portion of its total income from Defendant" [Vol. I, R. 104]."

Petitioner's Motion to Vacate the Judgment explained his failure to request disqualification earlier pointing out that he was unaware of the specifics of Sect. 455 and believed his only remedy was a 28 U.S.C. Sec. 144, actual prejudice motion. Such a motion must be timely. The Motion to Vacate also pointed out that the trial judge never personally revealed the specifics of her spouse's relationship with Respondent. The motion also requested transfer "for further discovery and a new trial." [Vol. I, R. 100]. Petitioner's motion pointed out that Sect. 455(b) cannot be waived and the trial court cannot even request such a waiver.

The trial court, in its only acknowledgment of her spouse's relationship to Respondent CSX, stated in its December 1989 order that, "The judge's spouse, an attorney, is at time retained by the defendant to represent

it in specific cases and matters, as are other attorneys in the legal community. He is not in-house counsel nor is he paid a retainer. He has not participated in this matter in any way." [R. 21]

After filing of the post trial Motion to Vacate, Petitioner discovered that Martindale-Hubbell Law Directory had listed the CSX as a primary representative client for the trial court's spouse for three consecutive years. The trial court's spouse represented three other railroads and is a past president and current member of the National Association of Railroad Trial Counsel. The trial judge was a member of her husband's firm prior to her appointment to the United States District Court in 1986.

During briefing on the post trial motions, Petitioner noticed a recent opinion of the Sixth Circuit Court of Appeals, *CSXT v. Pitz Director of Dept. of Transportation of State of Michigan*, 883 F.2d 468 (1989) (Cert. Denied 3/19/90 at 110 S.Ct. 1480), challenging the constitutionality of a Michigan statute relating to railroads. The attorneys of record included a CSX attorney from its corporate headquarters and the trial court's spouse and her daughter. This was the first petitioner had any knowledge that not only was the Court's spouse receiving income from the Respondent, but so was her daughter.

The Sixth Circuit's opinion acknowledges that if Respondent CSX was a material client a financial interest could exist. It concluded that:

> "CSX is listed as a client in Mr. Hackett's firm's listing in Martindale Hubbell for 1987, 1988, and 1989, and four of the first five clients listed are railroads. Moreover, Mr. Hackett represented CSX in major litigation at the time this case was going to trial. Nevertheless, we think Sullivan has failed to show a sufficient financial interest to warrant reversing the

> district court's decision to deny the motion to vacate the judgment. We are aware of Sullivan's difficulty in trying to prove that the district court has a financial interest in this case, or in the defendant corporation, based upon Mr. Hackett's representation of CSX, without detailed disclosure from the district judge of the extent of her husband's relationship to the railroad. Sullivan had the burden of proof, however, and he could have met this burden by calling as witnesses representatives of CSX who assign CSX's legal work. He also could have called Mr. Hackett to testify as to his relationship with CSX . . . We cannot say, merely on the basis of Sullivan's argument, that this relationship constituted a material financial interest requiring the judge to recuse herself." [Pg. 11 of Opinion]

The opinion also concludes that "adviser" within the meaning of the 455(d)(4) financial interest section was not intended to cover the attorney-client relationship between the trial court's attorney-spouse and the Respondent corporation (and the spouse's client) who is appearing before it—provided the attorney-spouse and the client-party's relationship involves advice on matters not related to the precise litigation before the trial court.

Since the opinion suggested that a "sufficient" financial interest had to be proved and that Petitioner (as opposed to the trial court and Respondent who knew the true facts) had a burden of proving the material financial interest, Petitioner filed a Petition for Rehearing. The Petition not only challenged the Court's conclusion and requirement of a "sufficient" financial interest but urged the Court, as an alternative, to remand this matter to the trial court for a hearing on the extent of the professional and financial relationship between the Respondent CSX and the trial court's spouse and daughter. It also suggested that since Respondent CSX was before the

Court and would know exactly how much money CSX was paying to the trial court's spouse and daughter during the time period involved, the CSX could and should be ordered to produce the information in the Court of Appeals to determine if the amount of money constitutes a "sufficient" financial interest.

The Petition for Rehearing was denied.

REASONS FOR GRANTING THE WRIT

I.

A UNITED STATES DISTRICT COURT JUDGE SHOULD BE REQUIRED TO MAKE FULL DISCLOSURE OF THE CIRCUMSTANCES SURROUNDING HER SPOUSE'S PROFESSIONAL AND FINANCIAL RELATIONSHIP WITH A PARTY.

The impact of the decision below is such that under its holdings a United States District Court Judge is *not* required to personally make full disclosure of the circumstances surrounding a spouse's professional and financial relationship with a party. Petitioner submits that this is not the intent of the United States Judicial Code.

Indeed, the Federal Judiciary is held to a higher standard than that expressed in the opinion below. Petitioner relies on this Court's recent opinion in *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 108 S.Ct. 2194 (1986). This Court, reviewing the 455(a) provision on this disqualification statute stated:

> "These facts create precisely the kind of appearance of impropriety that §455(a) was intended to prevent. The violation is neither insubstantial nor excusable. Although Judge Collins did not know of his fiduciary

> interest in the litigation, he certainly should have known. In fact, his failure to stay informed of this fiduciary interest, may well constitute a separate violation of §455. See §455(c). Moreover, providing relief in cases such as this will not produce injustice in other cases; to the contrary, the Court of Appeals' willingness to enforce §455 may prevent a substantive injustice in some future case by encouraging a judge or litigant to more carefully examine possible grounds for disqualification and to promptly disclose them when discovered."

and in footnote 8:

> "Petitioner's argument ignores important differences between subsections (a) and (b)(4). Most importantly, § 455(b)(4) requires disqualification no matter how insubstantial the financial interest and regardless of whether or not the interest actually creates an appearance of impropriety. See § 455(d)(4); *In re Cement and Concrete Litigation*, 515 F.Supp. 1076 (Ariz. 1981), mandamus denied, 688 F.2d 1297 (CA9 1982), aff'd by the absence of quorum, 459 U.S. 1191, 103 S.Ct. 1173, 75 L.Ed.2d 425 (1983). In addition, §455(e) specifies that a judge may not accept a waiver of any ground for disqualification under §455(b), but may accept such a waiver under §455(a) after 'a full disclosure on the record of the basis for disqualification.' Section 455(b) is therefore a somewhat stricter provision, and thus is not simply redundant with the broader coverage of §455(a) as petitioner's argument posits."

The Court below did not enforce the clear meaning of Sections 455(b)(4) and (d)(4). Moreover, it was unwilling to find out just how extensive a financial interest is involved by remanding this matter for an evidentiary hearing.

The procedural history of this Court's recent decision in *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S.

847, 108 S.Ct. 2194 (1986), illustrates the serious errors of the opinion below. In *Liljeberg*, the trial court denied the original motion to vacate the judgment. The Fifth Circuit, in an unpublished opinion, remanded for an evidentiary determination of additional facts deemed relevant to recusal, 747 F.2d 1463 (1984). The second opinion of the Fifth Circuit, which was published (796 F.2d 769), and which vacated the judgment, noted the following rationale for remand in the unpublished opinion:

> "the judiciary must be governed by the appearance as well as the reality of disinterested adjudication," 796 F.2d at 799.

Petitioner, a railroad brakeman, is entitled to the *reality* of disinterested adjudication. A reversal of the lower court opinion on the Record before this Court and/or a remand for evidentiary hearing serves justice and that purpose.

The purpose of the Judicial Code's disqualification provisions are to insure that circumstances surrounding a trial court or its spouse's relationship are fully revealed. The opinion below undermines that purpose. The fact the opinion is unpublished is unimportant. Impartial judges are required in every case—not just published opinions.

II.

THE RECEIPT OF ATTORNEYS FEE'S BY THE SPOUSE OF A UNITED STATES DISTRICT COURT JUDGE SHOULD CONSTITUTE A "FINANCIAL INTEREST" WITHIN THE SCOPE OF SECTION 455 MANDATING DISQUALIFICATION OF THE UNITED STATES DISTRICT COURT JUDGE IN CASES INVOLVING THE PARTY REPRESENTED BY THE SPOUSE.

455(b)(4) provides that a judge shall disqualify herself when she or her spouse "has a financial interest in the subject matter in controversy *or in a party to the pro-*

ceeding . . ." (emphasis added). However, the impact of the lower Court's opinion herein is such that now the financial interest of the trial judge must only be "sufficient" or "material" thereby eliminating the "however small" limitation of 455(d)(4).

The simple question becomes whether Judge Hackett's husband has a financial interest as defined by 455(d) in the Respondent CSX. Financial interest pursuant to 455(d)(4) is defined as "a legal or equitable interest, however small, or a relationship as a director, adviser or other active participant in the affairs of a party . . .". 455(b) and (d)(4) mandate recusal anytime a financial interest exists—regardless of its extent.

The trial court's spouse clearly has a legal or equitable interest, however small, in Respondent CSX. Since the trial court's spouse was performing professional services for which Respondent CSX owed compensation to the trial court's spouse, then that obligation alone creates a financial interest, however small. The fact Respondent has engaged the attorney services of the trial court's spouse for monetary compensation throughout the pendency of Petitioner's case before the trial court is manifestly a legal or equitable interest in the party. Moreover, the ruling below has erroneously removed the "however small" limitation from the Statute. That statutory language intends the opposite of the Court's ruling requiring proof of a "material" or "sufficient" financial interest.

The only reported ruling on similar facts, *Diversifoods v. Diversifoods*, 599 F.Supp. 133 (1986), discusses the recusal policy of a trial judge whose husband was a partner in a very large Chicago law firm (Mayer, Brown & Platt). In *Diversifoods* the attorney-spouse's firm—not the spouse—had previously represented the party on an un-

related matter and was not currently representing the party. The trial judge did not recuse herself. Here, the trial judge's spouse represented the Respondent in at least one major litigated case during the pendency of this case. Respondent is also listed as a representative material client in Martindale-Hubbell for the spouse's much smaller law firm—a law firm in which he is the only partner who specializes in railroad law. The trial judge in *Diversifoods* would likely recuse on the known facts in this case. Other than this trial court's opinion, no other decision addresses the issues involved here.

Petitioner should know the reality of the trial judge's financial interest in Respondent and where any exists no matter how small, the judgment should be vacated and a new trial ordered.

III.

THE SPOUSE OF A UNITED STATES DISTRICT COURT JUDGE WHO REPRESENTS A PARTY LITIGANT IN OTHER MAJOR LITIGATION SHOULD BE CONSIDERED TO BE AN ADVISER OR ACTIVE PARTICIPANT IN THE AFFAIRS OF THAT PARTY LITIGANT THEREBY MANDATING THE DISQUALIFICATION OF THE UNITED STATES DISTRICT COURT JUDGE UNDER THE PROVISIONS OF SECTION 455 OF THE JUDICIAL CODE.

The trial court's spouse was also an "adviser" to Respondent CSX. Advice is the most important service that a lawyer can give. As Abraham Lincoln said: "A lawyer's time and advice are his stock in trade." No reported case purports to define what constitutes "adviser", but its generic classification suggests a broad interpretation was intended. Indeed, it would appear to apply to advisers regardless of whether the adviser was compensated or not. The thrust of the Statute focuses on the existence of a relationship. An attorney has a confidential, trusting,

fiduciary, advisory relationship with his client. The trial court's spouse was an adviser to Respondent. The lower court's opinion, which restrictively interprets this provision, is erroneous.

Equally clear is that a trusted attorney who represents a party challenging the constitutionality of a state statute in the District Court and the Court of Appeals is a person who is "an active participant in the affairs of a party." An attorney speaks for the party, his words can bind a party or constitute an admission on behalf of a party. An attorney surely actively participates in the affairs of a party. Because *CSXT v. Pitz* was a reported appeal, this is the only case title known to Petitioner in which the trial court's spouse was the Respondent's attorney. The admissions of Respondent and the trial court clearly indicate there are other cases and the listing of Respondent CSX as a representative client for several years by the trial court's spouse indicates an ongoing relationship. Because neither Respondent nor the trial judge have revealed the number of cases involved, the hours spent, or the fees charged by the trial court's spouse and paid by Respondent; the amount of the financial interest, the extend of the adviser relationship with CSX, and the frequency of active participation in the affairs of CSX, is not *now* known.

IV.

FAILURE TO HOLD AN EVIDENTIARY HEARING NOT EVEN CONTEMPLATED BY THE JUDICIAL CODE CANNOT BE INTERPRETED TO BE A WAIVER BY A PARTY OF THE PROVISIONS OF SECTION 455 WHEN CONGRESS HAS EXPRESSLY STATED THAT THE PROVISIONS OF SECTION 455 SHALL NOT BE WAIVED.

Since the opinion below imposes upon the petitioner the burden of proving a financial interest, if he fails to re-

quest a hearing he has waived a disqualifying circumstance that Congress has declared cannot be waived. This is not the intent of Congress in drafting the Judicial Code since Congress clearly stated in Section 455(e) that these circumstances cannot be waived.

Liljeberg, like numerous other lower court decisions, and the statute itself, emphasizes full disclosure of facts bearing on the trial court's impartiality. Yet, in the case at bar, the United States District Court Judge sought and accepted an alleged waiver of these grounds. The Court of Appeals then stated that such a waiver should not be sought and cannot be accepted but then proceeded to decide this case based upon what it claims are the absence of necessary facts in the Record. It is the trial judge who has duty to reveal those facts and circumstances. Prior to trial, the trial court did not disclose any detailed facts. In response to Petitioner's Motion to Vacate, the trial court's Order disclosed no additional fact other than those contained in the handwritten waiver tendered by the clerk. Instead, the Order states conclusions—not facts—and the admonition that Petitioner need have "no concern" for the situation. This is not full disclosure as contemplated by the statute.

Section 455 requires the trial court to disclose facts. To the extent the decision below requires Petitioner to prove the amount or extent of the "financial interest," that decision erroneously permits waiver of a 455(b) violation.

CONCLUSION

The issues here have substantial importance to a fair and impartial judiciary, but more importantly, they have substantial importance to Petitioner because he should know whether the many discretionary rulings the trial court found in favor of Respondent were the decisions of an objective and impartial judge or a judge whose spouse receives income from Respondent, advises Respondent, and actively participates in the affairs of Respondent.

Accordingly, for the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted. In the alternative, Petitioner requests such other relief which this Court deems appropriate.

Respectfully submitted,

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Dated: March 16, 1992

APPENDICES

APPENDIX A

Not for Publication

[Filed October 25, 1991]

Nos. 90-1136; 90-1412

THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MICHAEL J. SULLIVAN,

Plaintiff-Appellant,

v.

CHESAPEAKE AND OHIO RAILWAY COMPANY,

Defendant-Appellee.

On Appeal from the United States District Court for the Eastern District of Michigan.

Before: JONES and RYAN, Circuit Judges; and BROWN, Senior Circuit Judge.

RYAN, Circuit Judge. Plaintiff Michael Sullivan seeks a new trial on damages only in this action brought under the Federal Employers' Liability Act (FELA), 45 U.S.C. § 51 *et seq.*, and the Federal Safety Appliance and Equipment Act, 45 U.S.C. § 1 *et seq.* The issues are whether the district court erred in:

1. Refusing to allow plaintiff to call a medical expert not listed in the final pretrial order;

2. Refusing to vacate the judgment upon grounds challenging the court's qualification to hear the case;

3. Refusing to grant a mistrial following defense counsel's reference to collateral benefits; and

4. Refusing to give plaintiff's tendered jury instructions.

We hold that the district court committed no prejudicial error or abuse of discretion warranting reversal and, therefore, affirm.

I.

Plaintiff Michael Sullivan was a fourteen-year employee of defendant Chesapeake & Ohio Railroad, now known as CSX Transportation. On May 13, 1987, Sullivan injured his leg and knee when he attempted to open a coupling knuckle on one of defendant's rail cars. He did not return to work after the accident.

Over the next eighteen months, at CSX's request, Sullivan tried returning to work on several occasions but never worked more than two days because he would experience swelling and pain in his knee. His treating physician, Dr. Morrison, restricted him from work after each attempt to return during 1988 and 1989.

On December 10, 1987, Sullivan brought this action under the Federal Employers' Liability Act, 45 U.S.C. §§ 51-60, and the Federal Safety Appliance and Equipment Act, 45 U.S.C. §§ 1-32.

The following occurrences give rise to the several issues in this case, which we shall address *seriatim*.

A.

In an effort to have current medical information at trial, CSX requested a physical examination of Sullivan within forty-five days of trial which was scheduled to begin on

November 22, 1988. Because Sullivan objected, CSX obtained a court order for the examination. Dr. Wolf, who conducted the examination on October 7, 1988, concluded that Sullivan was able to return to work. Sullivan received Dr. Wolf's report on October 31, 1988.

After the final pretrial order was signed, Sullivan sought to depose Dr. Eisenman, who was not identified in the pretrial order, as an expert witness to rebut or contradict Dr. Wolf's report. CSX's motion to quash the deposition was denied by a magistrate-judge. The court, finding that Dr. Eisenman was not a necessary rebuttal witness and that it would be unfair to CSX to add another medical witness after the close of discovery, set aside the magistrate-judge's order and granted CSX's motion.

B.

The final pretrial order was filed at the pretrial conference on November 15, 1988. This order, signed by plaintiff's counsel, included the following statement:

> Plaintiff is aware that Judge Hackett's husband is an attorney who represents CSX Transportation and he waives any objections to her presiding over this case.

C.

Prior to trial, Sullivan moved in limine to exclude any reference to Sullivan receiving railroad retirement benefits. The court took the matter under advisement, promising to reconsider the subject if "any problems" should arise during trial. During the jury voir dire, plaintiff's counsel noted that workers' compensation benefits were not available to railroad workers. During direct examination of Sullivan, his counsel asked about specific benefits Sullivan was receiving. On cross-examination of Sullivan, defense counsel asked Sullivan whether he was receiving

any collateral source benefits. Plaintiff's counsel objected and the court admonished defense counsel not to pursue the matter.

D.

At trial, Sullivan presented the testimony of economist Michael Thomson who testified concerning Sullivan's projected loss of earnings from his railroad occupation. Later, Sullivan's counsel requested the court to instruct the jury in the language of Federal Pattern Jury Instruction 85.12. The instruction references the situation in which an economist testifies. Instead, the court used 85.11, an instruction intended for use when no economist testifies.

E.

The jury found that a violation of the Federal Safety Appliance and Equipment Act's coupler provisions caused Sullivan's injuries. The jury further found that the railroad's negligence caused his injuries, and that Sullivan was fifty percent contributorily negligent. The jury found that the gross amount of Sullivan's damages was $40,000 and the court entered judgment in that amount based upon the provisions of the Act.

After the verdict, Sullivan moved for a new trial on liability, and CSX moved for a new trial on damages. The district court denied both motions. The court also denied Sullivan's motion to vacate based on the judge's failure to *sua sponte* disqualify herself, pursuant to 28 U.S.C. § 455(b), due to a financial interest in the case.

II.

Sullivan argues that $40,000 in damages is inadequate to compensate him for his loss of earnings. He seeks a

new trial on damages only, contending that in light of the strong evidence in his favor, the verdict could be so low only because of the cumulative effect of the court's prejudicial errors. We now turn to those asserted errors.

A.

Sullivan contends that it was prejudicial error for the district court to refuse to modify the pretrial order to permit the testimony of his medical expert, Dr. Eisenman, when the court allowed CSX's medical expert, Dr. Wolf, to testify as to Sullivan's current medical condition, his prognosis, pre-existing injuries, and the treating physician's surgical report. CSX responds that the court did not abuse its discretion in refusing to modify the order as Dr. Eisenman was offered after the close of discovery and rebuttal was possible through Sullivan's two treating physicians, Drs. Morrison and Dubin.

In May 1988, CSX moved for a Fed. R. Civ. P. 35 medical examination to be scheduled after discovery was closed in order to provide a current record of Sullivan's condition for trial. The court ordered this examination to occur no later than forty-five days before trial in order to accommodate Sullivan's concerns of inadequate time to rebut the findings. Dr. Wolf conducted the court-ordered examination on October 7, 1988, forty-five days before trial was scheduled to begin. Dr. Wolf prepared a report on October 10 which was received by CSX on October 12 and sent to Sullivan on October 31. A subsequent video deposition was also given by Dr. Wolf.

On November 8, the final pretrial order was due. Dr. Wolf's name was included on the witness list, but Dr. Eisenman's was not. On November 17, Dr. Eisenman examined Sullivan. On the same day, plaintiff's counsel sent

defense counsel a letter identifying Dr. Eisenman as a witness to rebut or contradict Dr. Wolf.

CSX filed an emergency motion to quash the deposition of Dr. Eisenman. This motion was referred to a magistrate-judge who consulted the court's scheduling order to determine whether witnesses not identified in the pretrial order were permitted. The court's scheduling order provided that:

> If, after submission of the FPTO [Final Pretrial Order], it develops that other witnesses will or may be called to testify at the trial, their names and addresses and the general subject matter of their testimony shall be reported to other counsel at the earliest possible date. (This restriction shall not apply to rebuttal witnesses, the necessity of whose testimony cannot be reasonably anticipated before trial.)

The magistrate judge found that the order allowed Sullivan "to secure rebuttal evidence regarding the examination conducted on the person of Plaintiff by Defendant's doctor in October" and thus denied CSX's motion to quash the deposition of Dr. Eisenman. The court set aside the magistrate's order and granted CSX's motion because:

> Dr. Eisenman is not a necessary rebuttal witness and plaintiff is well beyond the discovery time allowed by this court. A deposition of a non-treating physician, who is not listed in the final pretrial order and who did not author a report until after the depositions of all medical witnesses who were listed in the final pretrial order, is unfair and prejudicial to defendants.

Because the trial date was postponed, the court later ordered a second medical examination by Dr. Wolf to update the court on Sullivan's condition.

The district court has broad discretion to modify or enforce a pretrial order and its rulings will be reversed on appeal only for an abuse of discretion. *Jackson v. Seaboard Coast Line R.R. Co.*, 678 F.2d 992, 1019 (11th Cir. 1982). "[T]hese orders and stipulations, freely and fairly entered into, are not to be set aside except to avoid manifest injustice." *Sherman v. United States*, 462 F.2d 577, 579 (5th Cir. 1972) (citing Fed. R. Civ. P. 16). Amendments are permitted "where no substantial injury will be occasioned to the opposing party, the refusal to allow the amendment might result in injustice to the movant, and the inconvenience to the court is slight." *Id.*

No injustice to the movant occurs when the court prohibits a witness not listed on the witness list from testifying in order to contradict the opponent's testimony where the offering party knew his opponent would present evidence on the issue. *Jackson*, 678 F.2d at 1019. This is especially true where a movant, such as Sullivan, makes no offer of proof at trial regarding the excluded testimony. *Id.* As this was a FELA action involving an inability to work due to a work-related accident, Sullivan knew that his medical condition was at issue and, prior to entry of the pretrial order, he knew that CSX would offer evidence of his medical condition through the expert medical testimony of Dr. Wolf. The availability of Drs. Dubin and Morrison to contradict Dr. Wolf's findings suggests that Sullivan would suffer no injustice as a result of the court's ruling. Sullivan's complaints focus on Dr. Wolf's critique of Dr. Morrison's report, Dr. Wolf's comments on Sullivan's history, and the cause of the accident. Dr. Morrison was qualified to respond to all of those matters. Sullivan thus failed to show manifest injustice. Additionally, Sullivan failed to show that "no substantial injury [would] be occasioned to the opposing party." *Sherman*, 462 F.2d at

579. The court explicitly found that "[a] deposition of a non-treating physician, who is not listed in the final pretrial order and who did not author a report until after the depositions of all medical witnesses who were listed in the final pretrial order, is unfair and prejudicial to defendants." Considering the availability of other medical witnesses and the potential prejudice to CSX, the court did not abuse its discretion by refusing to allow Dr. Eisenman to testify.

B.

Plaintiff's counsel signed a stipulation contained in the final pretrial order which stated that "plaintiff is aware that Judge Hackett's husband is an attorney who represents CSX Transportation and he waives any objections to her presiding over this case." After the verdict, plaintiff filed a motion to vacate the judgment, pursuant to 28 U.S.C. § 455(d)(4), based on his belief that the court had an impermissible "financial interest" in the case. The court denied this motion, stating that

> [t]his section simply is not applicable to the trial judge in this case. Her spouse has no financial interest in the subject matter in controversy or any party to the proceedings, or any other interest that could be substantially affected by the outcome of the proceeding. The judge's spouse, an attorney, is at times retained by the defendant to represent it in specific cases and matters, as are other attorneys in the legal community. He is not in-house counsel nor is he paid a retainer. He has not participated in this matter in any way. Neither this judge nor her spouse will benefit from the outcome in this case.

A recusal motion is committed to the sound discretion of the district court. On appeal, we ask only whether the court abused its discretion. *The Chitimacha Tribe of Loui-*

siana v. Harry L. Laws Co., Inc., 690 F.2d 1157, 1162 (5th Cir. 1982), *cert. denied*, 464 U.S. 814 (1983).

28 U.S.C. § 455(b)(4) provides that a judge shall disqualify herself when she knows that she or her spouse "has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding." A " 'financial interest' means ownership of a legal or equitable interest, however small, or a relationship as director, advisor, or other active participant in the affairs of a party." 28 U.S.C. § 455(d)(4). A party may not waive section 455(b) as it is a *per se* rule requiring recusal in particular circumstances. *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1527 (11th Cir. 1988), *cert. denied*, 490 U.S. 1066 (1989). Plaintiff's counsel's signature on the pretrial order thus does not preclude plaintiff from raising the recusal issue now.

Sullivan contends that the trial judge has a financial interest in this case due to her husband's prior representation of CSX in other matters, her daughter's representation of CSX on at least one occasion, and her prior affiliation with her husband's firm. To meet the burden of showing financial interest, a movant must do more than allege that "law firms are interested in as many clients as they can get, that [the judge's husband's firm] would like to keep the defendant as a client, and that if the defendant loses this lawsuit, it will take its legal business elsewhere." *Diversifoods, Inc. v. Diversifoods, Inc.*, 595 F. Supp. 133, 139 (N.D. Ill. 1984); *see also Chitimacha*, 690 F.2d at 1166-67. It is conceivable that a showing could be made, in a proper case, that a court's spouse may have such a material relationship to a client that it may be said that a financial interest exists.

Sullivan contends that CSX was such a material client. CSX is listed as a client in Mr. Hackett's firm's listing in Martindale Hubbell for 1987, 1988, and 1989, and four of the first five clients listed are railroads. Moreover, Mr. Hackett represented CSX in major litigation at the time this case was going to trial. Nevertheless, we think Sullivan has failed to show a sufficient financial interest to warrant reversing the district court's decision to deny the motion to vacate the judgment. We are aware of Sullivan's difficulty in trying to prove that the district court has a financial interest in this case, or in the defendant corporation, based upon Mr. Hackett's representation of CSX, without detailed disclosure from the district judge of the extent of her husband's relationship to the railroad. Sullivan had the burden of proof, however, and he could have met this burden by calling as witnesses representatives of CSX who assign CSX's legal work. He also could have called Mr. Hackett to testify as to his relationship with CSX. Sullivan failed, however, to call any witnesses regarding the relationship between Mr. Hackett and CSX. We cannot say, merely on the basis of Sullivan's argument, that this relationship constituted a material financial interest requiring the judge to recuse herself.

Sullivan further contends that the judge should have recused herself because, by his repeated representation of CSX, Mr. Hackett was an "adviser" which constitutes a financial interest under section 455(b). In making this argument, Sullivan relies on *United States v. Amerine*, 411 F.2d 1130 (6th Cir. 1969), where the district judge in a criminal matter had been the United States Attorney during the preliminary proceedings against the defendant. This court found that recusal was necessary because the judge, when he was the United States Attorney, had been an adviser in the same case. Here, neither the district

judge nor her husband had any involvement with the case and thus were not CSX advisers. Moreover, because section 455(b)(5)(ii) clearly covers the lawyer-client relation by providing that a judge must recuse herself when she "or [her] spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person . . . [i]s acting as a lawyer in the proceeding," we are not convinced that the term "advisor" in section 455(4)(d) was also intended to cover this relationship. The fact that we reached a different result in *Amerine* may be explained by the subsequent amendment of section 455 to provide that judges formerly serving as government officials should recuse themselves from any matter that they participated in as a counselor or adviser. 28 U.S.C. § 455(b)(3). The case does not stand for the proposition that a judge must recuse herself if her spouse occasionally represents a party in other matters. We think Sullivan failed to show the existence of a formal interest under Section 455(b).

Sullivan does not raise, and therefore we do not address, whether recusal would have been required under section 455(a).

C.

Sullivan had moved in limine to keep out any reference to railroad retirement benefits. CSX responded that it did not intend to introduce evidence of the railroad retirement plan. The court took the matter under advisement and told CSX that "[s]hould something be introduced in plaintiff's case that makes you believe it would be appropriate to address that, I'll revisit this."

On direct examination, Sullivan's counsel elicited the following testimony from Sullivan:

> Q.: Okay. Now, Mr. Sullivan, you've received medical care and treatment. Who's paid the medical bills?

A.: Travelers Insurance Company.

Q.: And that's your—your employee fringe benefits insurance company?

A.: Right.

Q.: I just want it clear, you didn't pay for it?

A.: No.

Q.: While you've been off and not working, Mr. Sullivan, have you received any salary, wages or money from the railroad?

A.: No. The railroad hasn't given me any money at all since I've been off.

Q.: But just so the jury is clear, the occasions that you did return to work, you got paid for those?

A.: Oh, yes, the days I worked I got paid for.

Defense counsel, believing that plaintiff had opened the door by suggesting the *absence* of collateral source benefits, asked the following questions:

Q.: Now, Mr. Thompson asked you on direct that your medicals were paid for by Travelers, which is through your employer, and you're not claiming any medicals, correct?

A.: No. Travelers insurance has paid for everything.

Q.: And that's been through your employer?

A.: Yes.

Q.: And, then he said you weren't paid any wages by the railroad during this period of time?

A.: Other than the days I went back to work. I was paid for those days.

Q.: You're not telling this jury you didn't get any other types of benefits during that time, are you?

Plaintiff's counsel objected and the last question remained unanswered. At a bench conference, defense counsel ar-

gued that he was allowed to ask about collateral source benefits as plaintiff's counsel had opened the door by asking about benefits during direct examination and by his references to workers' compensation benefits during voir dire. The court ruled that because the "jury knows he's not out there with no income," the attorney should "[l]eave it alone." Plaintiff's counsel asked for, and was denied, a mistrial based on defense counsel's question about collateral source benefits.

Evidence of collateral source benefits is not admissible in FELA actions because such evidence "is readily subject to misuse by a jury." *Eichel v. New York Cent. R.R. Co.*, 375 U.S. 253, 255 (1963). "However, when the plaintiff makes specific reference to collateral source payments on direct examination, the scope of permissible inquiry is set by the direct examination and the usual rules on cross-examination apply." *Lange v. Missouri Pac. R.R. Co.*, 703 F.2d 322, 324 (8th Cir. 1983). The "usual rules on cross-examination" provide that "[c]ross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness." *Lange*, 703 F.2d at 324 (citing Fed. R. Evid. 611(b)). In *Lange*, evidence that the plaintiff had received workers' compensation benefits was admissible to test the plaintiff's credibility when the plaintiff had testified on direct examination that he returned to work immediately after his surgery because he had to support his family and had no savings to fall back on. *Id.* Likewise, the court in *Gladden v. P. Henderson & Co.*, 385 F.2d 480, 483-84 (3rd Cir. 1967), *cert. denied*, 390 U.S. 1013 (1968), ruled that

> plaintiff on direct examination brought into the case an additional, affirmative element by testifying that he had returned to work and had not visited Dr. Krause again because he had fallen behind in the pay-

> ment of his bills and wanted to catch up on them and support his family. Defendant was not required to leave this testimony unchallenged and had the right to ask plaintiff on cross-examination whether he had received financial assistance, as affecting the credibility of his assertion. To have forbidden such cross-examination would have conferred on plaintiff the unparalleled right to give testimony on direct examination with immunity from inquiry on cross-examination. . . .[T]he collateral benefit rule cannot be made a springboard from which a plaintiff may go forward with affirmative evidence that he returned to work while he was still ailing, because of financial need and then seek immunity from cross-examination regarding it. The boundary of silence was crossed when plaintiff affirmatively presented on direct examination the reason why he had returned to work after seven weeks and had not again visited his physician. The trial court therefore was justified in opening the door for cross-examination for the narrow purpose of testing the credibility of plaintiff's assertion.

The court explicitly distinguished its case from *Eichel* where "the plaintiff had not affirmatively testified in such a manner as to warrant any effort at contradiction by cross-examination. Instead, defendant there attempted to introduce prejudicial evidence of disability pension payments simply because it was logically relevant on the extent and duration of the plaintiff's disability." *Id.* at 483. Collateral source benefits, then, may be a proper subject of cross-examination when the plaintiff's direct testimony erroneously states that he is not receiving any financial assistance.

CSX also contends that the door was opened by plaintiff's counsel mentioning workers' compensation during voir dire. In another FELA action where counsel argued

that FELA was the plaintiff's only possible remedy as he was ineligible for workers' compensation, the court commented that "ineligibility for workers' compensation benefits was completely irrelevant to the issues presented in this case, and allowing the jury to consider such information could have prejudiced the Railroad." *Stillman v. Norfolk & W. Ry. Co.*, 811 F.2d 834, 838 (4th Cir. 1987). As the court explained, "defendants in FELA cases are not permitted to inform the jury that a plaintiff has received benefits from a collateral source. We perceive no reason for a different rule when the plaintiff in a FELA case seeks to inform the jury of the absence of benefits from a collateral source." *Id.* (citations omitted). Plaintiff's counsel in this case likewise should not have informed the jury that FELA has different rules about workers' compensation and that the jury should listen carefully to the judge's instructions.

Plaintiff's counsel asked on direct examination whether the plaintiff had "received any salary, wages or money from the railroad." The plaintiff denied that he had received any money from the employer. Counsel also asked whether plaintiff's hospital bills were covered by his employer's insurance and implied that workers' compensation would not be available. These questions and comments arguably opened the door to inquiry about benefits. The court did not err in refusing to grant a new trial based on defense counsel's questions about collateral benefits.

D.

Plaintiff's counsel argues that the court erred by instructing the jury in the language of Federal Pattern Jury Instruction 85.11 instead of pattern instruction 85.12 as requested. Appellate courts accord district judges broad discretion in formulating jury charges as long as the in-

struction accurately reflects the law and facts. *United States v. Heffington*, 682 F.2d 1075 (5th Cir. 1982), *cert. denied sub nom., Giella v. United States*, 459 U.S. 1108 (1983). In reviewing the instructions, an appeals court must look at the charge in its entirety. *United States v. Smith*, 584 F.2d 759 (6th Cir. 1978), *cert. denied*, 441 U.S. 922 (1979).

The instructions in dispute involve the concept of the present worth of loss of future earnings. Sullivan contends that the court should have given instruction 85.12 entitled "Alternative Instruction—Lost Wages and/or Earning Capacity—When Economic Experts Testify," as economist Michael Thomson had testified. The court instead gave instruction 85.11, "Damages—Present Worth of Future Loss." Both instructions tell the jury to reduce future loss to present worth. They differ in that 85.11 specifically tells the jury how to make this calculation and 85.12 instructs the jury that they may discount based on the economic principles discussed by the experts.

Sullivan does not contend that instruction 85.11 as given misstated the law or facts, only that he believes, in light of the expert testimony, that 85.12 was more appropriate. Instruction 85.12 and 85.11 both instruct as to reducing damages for future loss to present worth and are substantively similar. Laying aside the probability that neither instruction is entirely comprehensible to the average juror, we do not believe that the district court abused its broad discretion in utilizing 85.11 rather than 85.12.

III.

We conclude that the district court committed no error warranting reversal and did not abuse its discretion in refusing to vacate the judgment upon the recusal issue. Therefore, we AFFIRM.

APPENDIX B

[Filed December 19, 1991]

Nos. 90-1136/1412

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MICHAEL J. SULLIVAN Plaintiff-Appellant, (90-1136) Plaintiff-Appellee (90-1412)	)	
v.	)	
	)	ORDER
CHESAPEAKE & OHIO RAILWAY CO., A CORPORATION, Defendant-Appellee, (90-1136) Defendant-Appellant (90-1412)	)	

BEFORE: JONES and RYAN, Circuit Judges;
and BROWN, Senior Circuit Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER
OF THE COURT

/s/ LEONARD GREEN, Clerk

APPENDIX C

[Dated December 28, 1989]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHAEL J. SULLIVAN,
Plaintiff,
vs.

Case No.
87-CV-74410-DT

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, a corporation,
Defendant.
_____/

Hon.
Barbara K. Hackett

ORDER DENYING MOTION TO VACATE JUDGMENT

Plaintiff Michael J. Sullivan, by his attorney Robert B. Thompson, "moves this court to disqualify itself" pursuant to 28 U.S.C. § 455(b)(4). Counsel complains that the judge's spouse "is an attorney of record for the Defendant in this cause—CSX or Chesapeake and Ohio Railway Company—in other pending FELA matters." The section relied on by plaintiff provides that a judge shall disqualify himself (or herself) when "he knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding."

This section simply is not applicable to the trial judge in this case. Her spouse has no financial interest in the subject matter in controversy or any party to the proceedings,

or any other interest that could be substantially affected by the outcome of the proceeding. The judge's spouse, an attorney, is at times retained by the defendant to represent it in specific cases and matters, as are other attorneys in the legal community. He is not in-house counsel nor is he paid a retainer. He has not participated in this matter in any way. Neither this judge nor her spouse will benefit from the outcome in this case. The judge's spouse has no role in this matter and this fact was known to plaintiff's counsel in advance of trial as evidenced by the stipulation attached to the final pretrial order. Counsel had no concern at the time and need have none now.

This case was tried to a jury. Counsel's objections to rulings of this court relative to preliminary motions and during the course of the trial are all a matter of record. Plaintiff's disappointment in the amount of the verdict rendered for him by the jury is not grounds for the relief he is seeking in this motion to vacate judgment.

In summary, careful review of the file in this case indicates that plaintiff's motion is without foundation and lacks merit. Counsel and the court met frequently prior to trial and during trial to resolve differences. Ample opportunity was afforded the parties to raise any concerns. A hard-fought case was presented to an attentive jury and the jurors arrived at a unanimous verdict, a verdict which this court holds is supported by the record in this case.

For the above reasons, plaintiff's motion to vacate judgment is denied.

Defendant's request for sanctions also is denied.

SO ORDERED.

/s/ BARBARA K. HACKETT
United States District Judge

Dated:
DEC 28, 1989

APPENDIX D

[Dated August 7, 1989]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHAEL J. SULLIVAN,

Plaintiff,

vs.

Case No. 87-74410

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, a corporation,

Judge Barbara K. Hackett

Defendant.
_____/

MOTION TO VACATE JUDGMENT AND ALL PROCEEDINGS DUE TO TRIAL COURT'S FAILURE TO DISQUALIFY ITSELF PURSUANT TO 28 U.S.C. Sect. 455(b)

NOW COMES PLAINTIFF, Michael J. Sullivan, by his attorney, Robert B. Thompson, and moves this Court to a) disqualify itself pursuant to 28 U.S.C. Sec. 455(b)4; b) vacate all proceedings before it including judgment for Plaintiff; c) transfer said cause for further proceedings including discovery and trial; and d) invalidate any alleged waiver of said basis for disqualification pursuant to 28 U.S.C. Sec. 455(b)(4) since this Court had no authority to request or accept said waiver pursuant to 28 U.S.C. Sec. 455(e).

In support thereof, Plaintiff states:

1. 28 U.S.C. Sec. 455(b) identifies mandatory circumstances under which trial court must disqualify itself.

2. 28 U.S.C. Sec. 455(b) places the burden of disqualification on the trial court and does not, by its terms, provide for disqualification initiated by a party.

3. The notification by the trial court of circumstances requiring this trial court to disqualify itself occurred when Judge Hackett's clerk approached counsel during a break on the second day of evidence and presented for the first time Ex. 1 and requested both counsel to initial it. Plaintiff's counsel was in the midst of trial and was not prepared to fairly evaluate it.

4. Ex. 1 states the Trial Court's spouse is an attorney of record for the Defendant in this cause—CSX or Chesapeake and Ohio Railway Company—in other pending FELA matters. Plaintiff is still unaware of the extent and frequency of such representation.

5. The circumstances of the Trial Court's spouse being an attorney for CSX clearly violates subsection b(4) of 455 and constitutes a "financial interest" since an attorney is by definition an "adviser" or "participant" in the affairs of this corporate Defendant (CSX).

6. Subsection e of 455 prohibits this Trial Court from requesting or accepting a waiver of the grounds for disqualification under 455(b).

7. This motion is made pursuant to Sec. 455(b) and 455(e).

8. Ex. 1 states Plaintiff is "aware" of this situation to which Plaintiff states:

a) timeliness of this motion is *not* an issue under Sec. 455(b).

b) This Trial Court never stated or explained her spouse's relationship with the Defendant CSX except as identified by Ex. 1.

c) Ex. 1 is directed only to Plaintiff's waiver (not Defendant).

d) Plaintiff's counsel was "aware" of this situation as a result of statements by Defendant's counsel at or about the time of the Final Pretrial Conference. At that time, the Trial Court had already ruled unfavorably to Plaintiff by permitting defense medical expert testimony after discovery had closed and by denying Plaintiff any right to rebut that evidence—see Plaintiff's Motion for New Trial.

e) Plaintiff's counsel considered a motion alleging bias or prejudice (28 U.S.C. Sec. 144), but rejected it since there were no statements made of record. Further, in the 14 years Plaintiff's counsel had been an attorney he had *never* brought such a motion since he fears a motion based on belief or statements of others is likely to create more bias or prejudice from the mere bringing of the motion.

f) Further, Trial Court and Defendant had full knowledge of the relationship between Defendant and the Trial Court's spouse.

g) Plaintiff's counsel was at no time aware, had knowledge of, or was familiar with the specifics of 28 U.S.C. Sec. 455. Plaintiff's counsel *first* learned of the mandatory provisions of this section during discussions with the firm's appellate attorney, John J. Naughton, while preparing the Motion for New Trial.

9. The Trial Court failed to disqualify itself, failed to fully advise the Plaintiff's counsel directly of the relationship, and improperly requested and accepted a waiver of said disqualification.

WHEREFORE, Plaintiff requests that:

1. The judgment on behalf of Plaintiff be vacated.

2. All orders issued by the Trial Court be vacated.

3. That this Court invalidate the alleged waiver in Ex. 1 and disqualify itself; and

4. Transfer said cause for further discovery and a new trial.

Respectfully submitted,

/s/ ROBERT B. THOMPSON

/s/ JOHN J. NAUGHTON

HENSLEE, MONEK & HENSLEE
Attorneys for Plaintiff
30 N. LaSalle St., Suite 2100
Chicago, Illinois 60602-2585
(312) 782-5925
(800) 621-5050

Ex. 1

Appendix

3. STIPULATION OF FACTS

4. Plaintiff is aware that Judge Hackett's husband is an attorney who represents CSX Transportation and he waives any objections to her presiding over this case.

MEMORANDUM IN SUPPORT OF MOTION TO VACATE

Sec. 455(B) and the definition of financial interest contained therein clearly support the conclusion that this Court had an obligation on its own to disqualify itself.

Further, Congress by enacting subsection E took the very unusual step of not permitting any waiver by a party of the grounds for disqualification under Subsection 455(b). Clearly Congress felt it unfair to require the parties to be placed in a position where it must make any decision or even be asked to make any decision on waiving these grounds for disqualification.

The leading case on this matter in the 6th Circuit in *U.S.* v. *Amerine* 411 F2d 1130 (1969) in which the Defendant's motion for disqualification under the old 455 provisions was made at the conclusion of the trial. The motion was denied. The basis for disqualification was that the Trial Court had been a U.S. Attorney at the time the original charges were filed. That situation clearly violated 455 as does the situation here. Moreover, the trial Court personally advised Defendant of this fact prior to trial, on the record. On appeal, the Court ruled the trial judge erred and vacated all orders and proceedings which occurred before the disqualified judge. On this issue of timeliness, the Court stated:

> "The second reason argued to us for not reversing this case on the issue of disqualification is that appellant through counsel waived any disqualification claim. It is clear that appellant never suggested disqualification until the issue had been raised by the District Judge himself, and then the formal motion for disqualification was presented belatedly at the end of the trial.

> As we have already pointed out, however, the language of the statute is mandatory and it is addressed to the District Judge. United States v. Vasilick, supra.
>
> Further, whatever logical force the waiver argument might have otherwise, we believe it is completely negated by the fact that this statute originally required one of the parties to move for disqualification (see 28 U.S.C. 24 (1946)), but in 1948 Congress amended the statute, removing this feature entirely. Judicial Code 455, 28 U.S.C. 455 (1964).
>
> As the statute now stands, the duty to disqualify is placed solely upon the District Judge. Burdensome as this duty may occasionally prove to be (particularly where a District Judge has moved from the prosecutorial to the judicial function) we think the statutory mandate must be observed." F2d at 1134

Those cases which consider the issue of the timeliness of the motion for disqualification are cases in which the grounds for disqualification arise under 455(A). See *Bradly* v. *Milliken* 426 F.Supp. 929 (1977).

Respectfully submitted,

/s/ ROBERT B. THOMPSON

[Affidavit of Service omitted in printing]